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NAUM MORGOVSKY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**UNITED STATES OF AMERICA,**

Plaintiff,

V.

**NAUM MORGOVSKY, et. al,**

Defendants.

Case No. Cr-16-0411 VC

## DEFENDANT NAUM MORGOVSKY'S SENTENCING MEMORANDUM

Date: October 23, 2018

Time: 3:00 p.m.

Place: Honorable Vince Chhabri

## INTRODUCTION

Naum Morgovsky stands convicted, on his pleas of guilty, to violating the Arms Export Control Act (22 U.S.C. §§ 2778 and 2778(c)), and money laundering (18 U.S.C. § 1956(a)(1)(B)). Mr. Morgovsky pled “open” to two counts charging money laundering and one count charging conspiracy to violate the Arms Export Control Act without any plea agreement regarding his sentencing. Sentencing is scheduled for October 23, 2018. The government’s choice to charge Mr. Morgovsky with conspiracy under § 2778 rather than the general conspiracy statute (18 U.S.C. § 371)

1 appears to be unprecedented. § 2778 does not include any conspiracy provision and such a provision  
2 is found only in a regulation adopted under the statute. Our research has not disclosed a single export  
3 act prosecution wherein a defendant was charged with conspiracy under this regulation rather than  
4 pursuant to the § 371, the recognized vehicle for charging federal criminal conspiracies. The  
5 significance of this choice from a sentencing standpoint is that it enlarges Mr. Morgovsky's  
6 maximum sentence from five years under § 371, to 20 years under § 2778, based on precisely the  
7 same conduct. Mr. Morgovsky respectfully submits this memorandum for the court's consideration in  
8 sentencing.  
9

### 10 **NAUM MORGOVSKY**

11 Because of the protracted pre-trial proceedings in this case, the court has considerable  
12 knowledge at its disposal regarding the nature of the charges and the general thrust of the  
13 government's evidence. We believe some of the government's calculations, particularly in relation to  
14 the Morgovskys' finances and expenditures, are open to question, and his personal expenses in  
15 particular are exaggerated. As far as appears, the Morgovskys live a relatively modest life and are not  
16 extravagant in their lifestyle. However, while we will touch upon such matters in the course of this  
17 memorandum, we believe the most important aspect of the case is Naum Morgovsky himself, and  
18 because there was no trial, the court has not been appraised of many important facts concerning his  
19 life and his history. Therefore, we take up first the subject of defendant, Naum Morgovsky.  
20

21 Undersigned counsel has known Mr. Morgovsky for a considerable period of time, meeting  
22 him first in connection with the 2008 misdemeanor conviction involving a false identity that has been  
23 referred to in the course of these proceedings. Mr. Morgovsky is a unique individual and his case,  
24 perhaps more than any other within our memory, requires individualized sentencing considerations.  
25 Some of these find expression in the sentencing guidelines or in § 3553, but some are simply unique  
26 to Mr. Morgovsky. In the course of the lengthy pre-trial proceedings, the government castigated Mr.  
27

1 Morgovsky, often in harsh terms, for his conduct in exporting controlled night vision components  
 2 without a license. We would like to put these familiar accusations to one side, for Mr. Morgovsky has  
 3 pled guilty to these charges and, as the probation officer notes, has accepted responsibility for his  
 4 conduct. Mr. Morgovsky has truly accepted responsibility and is extremely remorseful for having  
 5 violated the law in this manner.

6 Mr. Morgovsky is 69 years old and in precarious health. Attached to this memorandum are  
 7 exhibits reflecting his serious medical problems that could only be exacerbated by a prolonged  
 8 incarceration. He is also a person who has exhibited throughout his life in this country an incredibly  
 9 warm and compassionate side to his character, constantly performing good deeds for others without  
 10 expecting anything in return. We have attached 24 letters (Exhibit 1) from persons from all walks of  
 11 life, attesting to his generosity and kindness. Many, but not all of these, come from people who  
 12 immigrated to this country from various places throughout the globe, including but not limited to  
 13 immigrant families and refugees from the former Soviet republics. For years he employed refugees  
 14 and immigrants, to provide them with comfort and security even when he could not afford to do so,  
 15 recognizing the barriers to employment these people faced. In countless ways he tried to ease the  
 16 pain of transition for these families, and to lessen their burdens. Their letters of gratitude are effusive  
 17 and heartfelt, and no picture of Mr. Morgovsky would be complete without including this pervading  
 18 warmth and generosity. The Morgovskys' daughter, Patricia, emphasizes this quality in her letter:  
 19

21 "That being said, he not only gave me strength, but also a strong moral  
 22 compass. He taught me to be good and to do good, and he lead by example. When I  
 23 was a child I thought the most normal thing in the world was helping those around you  
 24 in every which way possible. I witnessed my dad give jobs to a countless number of  
 25 immigrants. He lent and bought cars, rooms, money, clothes, and much more to those  
 26 who needed his help. He even convinced several employees to go through drug and  
 27 alcohol programs (paid for by him) and had jobs waiting for them when they  
 completed them. His selflessness has never had any bounds, to the point of not  
 sleeping or spending time on himself if anyone was in need of his help. Only when I  
 got a bit older did I realize that this was not "normal" – and I greatly loved and  
 respected the fact that he was such a great human being. And while his morals and  
 values might be brought into question considering his crimes, I know him and I know

1 that he never intended to harm anyone. It's just not who he is as a person. And while I  
2 hold him responsible for his actions and how they have affected my mom, myself, and  
3 my family, I continue to love him and support him in any way I can because I know  
4 what a wonderful person he is."

5 These sentiments are borne out by all of the letters submitted to the court. Included among  
6 them is a commendation from the Jewish Vocational and Career Counseling Service of San  
7 Francisco, praising his leadership in the community "through hiring, training and employing  
8 individuals with barriers to employment." This letter goes on to say that the barriers referred to "may  
9 include foreign language, work experience, disability, age, or educational background." Because of  
10 these activities and his commitment to building a diverse workforce and to ongoing training, the  
11 service presented an award to Mr. Morgovsky, recognizing his contributions.

12 When Antonova Nabezhda found she had multiple sclerosis and suffered while attempting to  
13 fulfill her duties administrating a building where she lived, Naum helped her in numerous ways,  
14 particularly with her son, who was experiencing difficulties. Ms. Antonova writes "I have had a very  
15 hard life all my life and could never count on anyone but myself. Naum has changed that and has  
16 proven to be the most decent and compassionate person I have ever met. When I met Naum, my  
17 family and I were complete strangers to him, but he always helped me and my family without  
18 hesitation. Everybody I have met who knows Naum have described him as a person who helps many  
19 people without expecting anything back. I never heard anybody say a bad word about him."

20 When Naum had numerous employees, he established a practice of helping them with their  
21 affairs outside the business context. He helped them get an education by paying for classes that would  
22 benefit their development and career growth (letter of Igor Sundukovskiy). He and Mrs. Morgovsky  
23 taught many immigrant employees reading skills they would need in their new environment (letter of  
24 Irina Kostiovkovskaia). He sponsored new immigrants and helped them find and furnish apartments,  
25 buy a car, and prepare resumes when necessary (letter of Natasha Rabey). He helped them learn  
26 English, develop new skills, and find employment (letter of Yevgeny Guzhavin). He helped one  
27

1 person, Alexander Shtromberg of San Francisco, learn to drive a car and to repair it, and stepped in to  
2 support people like Mr. Shtromberg, who were marooned in a strange land and had no other source of  
3 support.

4 Mr. Morgovsky's sister (Raisa Solovwova) writes emotionally about his care and attention to  
5 her family. She writes of his struggle with anti-Semitism in Ukraine as a youth and describes his hard  
6 work to graduate from college and support his family. Naum was a father figure to his older sister and  
7 she testifies to his tireless work with non-profit employment agencies, such as Jewish Vocational  
8 Service and the International Rescue Committee, giving jobs to virtually everyone with barriers to  
9 employment. Ms. Solovwova writes at length about the struggles of her grand-daughter, who has  
10 been diagnosed with several severe neuro-developmental disorders, including severe attention deficit  
11 hyperactivity disorder (ADHD) combined type; disruptive mood dysregulation (DMDD); anxiety  
12 disorder and autism spectrum disorder, among other debilitating conditions. The child, now 13,  
13 repeatedly tries to harm herself and runs away from all the facilities in which she has been placed.  
14 Naum has spent an enormous amount of time helping her to get placement and proper treatment, and  
15 initiating legal struggles to hold school districts accountable for their failure to support her  
16 adequately. Ms. Solovwova writes eloquently of her gratitude to her brother for his kindness and  
17 compassion.  
18

19  
20 One could literally quote endlessly from these testimonials and we respectfully urge the court  
21 to review them. They show Naum Morgovsky to be a person who, despite his flaws, is fundamentally  
22 good and well intentioned. We believe it is impossible to fully evaluate Mr. Morgovsky, considering  
23 his expansive qualities of warmth and compassion and also the qualities exhibited in the offense  
24 conduct here, without understanding where he came from and the forces that shaped him as a youth.  
25 Having observed Mr. Morgovsky at some length, we can say with some assurance that his social  
26 attitudes and perception of the state and its claims to authority over the individual were formed in his  
27

1 hardscrabble youth in what was then the Soviet republic of Ukraine. There, anti-Semitism was rife  
2 and Jews struggled with a daily regimen of humiliation and discrimination. Mr. Morgovsky resisted  
3 this treatment and was constantly forced into fights to defend himself. There is no doubt that Mr.  
4 Morgovsky was deeply affected by this discrimination and by the quotas imposed on Jews pursuing  
5 higher education in Ukraine. His father's death at a relatively young age thrust him into a position of  
6 responsibility at just 16, when he began working to support the family, but he was dogged by  
7 discrimination and developed a deep distrust of the old Soviet regime in his early childhood. His  
8 knowledge that his grandparents had been murdered by Nazis in Kiev in 1941 only increased his  
9 sense of alienation from the state and distrust of its institutions.  
10

11 Those deeply ingrained attitudes can be seen in the Naum Morgovsky who appears before the  
12 court for sentencing. Alongside his enormous compassion and positive qualities these writers  
13 describe, Mr. Morgovsky is a damaged human being in many respects. His guarded and sometimes  
14 secretive behavior and his seemingly life-long need to ward off impending doom, whether in the form  
15 of financial disaster, betrayal by persons close to him, or threats of physical retribution or even death  
16 at the hands of powerful individuals he has offended, are in many ways traceable to his background  
17 and the attitudes it engendered. The provocations faced by Mr. Morgovsky are not illusory and the  
18 threats are not non-existent, for there is abundant evidence to support them. But the pattern of  
19 unstable business and monetary relationships, reckless borrowing practices resulting in acute and  
20 seemingly hopeless financial distress, and a tendency to try to escape this desperate condition by  
21 overstepping laws and regulations he regards as oppressive, arbitrary and ill-conceived, all speak to a  
22 world view formed long ago in a place where life was always in danger and the law was an  
23 instrument of oppression.  
24

25  
26 In the course of this prosecution, Mr. Morgovsky has become more aware of these tendencies  
27 in himself, and of his responsibilities to his family. The fact that he has accepted responsibility for the

offense conduct here is important because it shows that he has insight into the problems giving rise to his situation. We can say with confidence, in light of this experience, that he will not be a recidivist. He has a strong capacity for helping needy and deprived members of his community and is at a stage of his life where he wants to perform these beneficial acts and does not wish to revisit the conduct that gave rise to this prosecution. At the age of 69 and in failing health, there is little to be gained by imposing a harsh or punitive sentence on Mr. Morgovsky. We respectfully invite the court's attention to all of these testimonials to his kindness and generosity. It is not too much to say that Mr. Morgovsky has made it his mission in private life to help other people.

**CONSIDERATIONS OF AGE AND HEALTH  
UNDER 18 U.S.C. § 3553(a)(2)(D)**

Mr. Morgovsky is over 69 years old, with multiple health problems having potentially serious consequences if not treated properly and timely. He requires medical treatment on an ongoing basis. His physical health problems are unlikely to be adequately treated in in prison, much less in the most effective manner.

As is evident from the letter from Mr. Morgovsky's cardiologist Dr. Jeffrey J. Guttas, M.D., F.A.C.C.<sup>1</sup>, he is being seen weekly due to "proximal atrial fibrillation" (an irregular heartbeat) and due to abnormally rapid heart rate known by the term of "tachycardia". He is receiving medicinal therapy and being followed closely, which includes regular EKGs, due to the potential dangers associated with these conditions of his heart. Tachycardia increases the risk of congestive heart failure or angina. Mr. Morgovsky's prescription for medicine intended to reduce his heart rate was recently changed to Bystolic. According to Dr. Guttas, Mr. Morgovsky's atrial fibrillation may

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<sup>1</sup> A copy of the letter is attached as Exhibit 2. The "F.A.C.C." designation stands for "Fellow of the American College of Cardiology".

1 require treatment such as Catheter Ablation<sup>2</sup> or Atrioventricular Mode (AV) Node Ablation<sup>3</sup>. The  
 2 most common complications of atrial fibrillation are strokes and heart failure usually resulting from  
 3 formation of blood clogs. Yet, due to Mr. Morgovsky's chronic duodenal ulcer, the use of blood  
 4 thinners is dangerous to him. If his atrial fibrillation is not followed regularly and treated properly  
 5 and timely, he is five times more likely to have a stroke than people who don't have atrial fibrillation,  
 6 according to the Centers for Disease Control and Prevention.

7       The letter from Mr. Morgovsky's gastroenterologist, Anne Thai<sup>4</sup> M.D., to his primary care  
 8 physician Dina Sverdlov M.D., shows that he has peptic ulcer disease, chronic gastritis,  
 9 gastroesophageal reflux disease, or GERD, dyspepsia (indigestion), and acute heartburn. Mr.  
 10 Morgovsky was diagnosed with duodenal ulcer at the age of 23, which precluded him from  
 11 being subjected to the mandatory draft in the country of his birth. These diseases pertaining to  
 12 his stomach require him to maintain a very strict diet without which his condition deteriorates  
 13 rapidly and dramatically. He is also required to take probiotics, enzymes, and food supplements  
 14 daily for his digestive system to function adequately.

15       Following his arrest on August 25, 2016, Mr. Morgovsky was incarcerated for several  
 16 days in a county jail until he was released on bail. During his brief incarceration, due to his  
 17 inability to maintain a strict diet and take the probiotics and enzymes, his condition rapidly  
 18 deteriorated, and the physician available at the jail was unable to provide any effective remedy.  
 19 As a result, Mr. Morgovsky lost almost 10 pounds during his brief incarceration, and the walls of  
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21  
 22  
 23  
 24 <sup>2</sup> A catheter delivers radio waves to the heart to destroy the abnormal tissue that sends out  
 irregular impulses.

25 <sup>3</sup> Radio waves destroy the AV node, which connects the atria and ventricles. Then the  
 26 atria can no longer send signals to the ventricles. A pacemaker is inserted to maintain a  
 regular rhythm.

27 <sup>4</sup> A copy is attached as Exhibit 3.

1 his stomach and his ulcer became severely irritated. As a result, shortly after being released from  
2 jail, his ulcer opened up and he also suffered a perforation of his stomach wall resulting in  
3 severe internal bleeding accompanied by irregular heartbeat. He bled from his mouth and was  
4 taken to an emergency room by an ambulance, where he was kept on IV with multiple medicines  
5 for two days until his condition improved. The ambulance staff identified severe atrial  
6 fibrillation as the main danger to him at that time. A copy of his discharge document is attached  
7 as Exhibit 4.

8  
9 Mr. Morgovsky's vision, which has required glasses since his early childhood, has been  
10 rapidly deteriorating over the last two years, and he has been diagnosed with nuclear cataract of  
11 both eyes which are steadily increasing, resulting in acute angle closure and optical hypertension  
12 in the right eye. His eyes are being regularly examined by ophthalmologists who have informed  
13 him that a failure to do so may result in a glaucoma resulting in complete vision loss. Copies of  
14 notes generated by two ophthalmologists between January and July of 2018 are attached as a  
15 collective Exhibit 5.

16  
17 We ask the Court to take into account that Mr. Morgovsky had a significantly harder time in  
18 his short custody than other prisoners because of his age and health problems. In fiscal year 2011,  
19 judges cited age as a reason to sentence below the guideline 995 times; 72.8% of these below-range  
20 sentences were based on § 3553(a) alone and not on a "departure" in whole or in part. Judges cited  
21 family circumstances 2,000 times; 73.5% were based on § 3553(a) alone. Judges cited physical  
22 condition 815 times; 63.5% were based on § 3553(a) alone. See U.S. Sent'g Comm'n, 2011  
23 Sourcebook of Federal Sentencing Statistics, tbls. 25, 25A, 25B. In response to a Commission survey  
24 in 2010, 67% of district court judges said that age is "ordinarily relevant," 64% said that physical  
25 condition is "ordinarily relevant," and 62% said that family circumstances are "ordinarily relevant."  
26 U.S. Sent'g Comm'n, Results of Survey of United States District Judges January 2010 through  
27

March 2010, tbl. 13 (2010)<sup>5</sup>. Asked why they do not rely on departures, 76% of judges said that the “Guidelines Manual does not contain a departure provision that adequately reflects the reason for the sentence outside the guideline range,” and 65% said the policy statements are “too restrictive.” Id., tbl.14. Obviously, it is not the law that these policy statements, to the extent that they discourage or restrict consideration of any relevant factor, control variances.

One of the goals of the Sentencing Reform Act was to provide for proportionality in punishment among offenses of different seriousness. S. Rep. No. 98-225, at 45-46 (1983). Indeed, the same prison sentence for an older offender amounts to harsher punishment than that for a young or middle-aged offender, because the sentence is a greater proportion of an older offender’s remaining life and can amount to a life sentence. See Hannah T.S. Long, The “Inequality” of Incarceration, 31 Colum. J. L. & Soc. Probs. 321, 343-44 (1998) (suggesting that prison sentences be adjusted for life expectancy due to age and illness). For example, the three-year prison sentence that Brian Gall was facing in his mid-twenties that the district court reduced to probation, *see Gall*, 552 U.S. at 41-45, pales in comparison to a similar sentence for a defendant like Mr. Morgovsky who is 69 years old and has multiple health problems with potentially serious consequences if not followed closely and treated properly and timely. Offenders’ health problems before and during incarceration “accelerate their aging processes to an average of 11.5 years older than their chronological ages after age 50.” U.S. Dep’t of Justice, National Institute of Corrections, Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates, at 10 (2004), available at <http://www.nicic.org/pubs/2004/018735.pdf>.

Offenders who committed their first crime after the age of 50 “have problems adjusting to prison since they are new to the environment, which will cause underlying stress and probable stress-

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<sup>5</sup> Available at [http://www.uscc.gov/Research/Research\\_Projects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.uscc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf).

related health problems,” and they are “easy prey” for more experienced inmates. *Id.* at 10. For older prisoners who are unfamiliar with prison culture, “the prison sentence represents nothing short of a disaster, a catastrophe, and, in consequence, they are often in a psychological state of trauma.” Elaine Crawley & Richard Sparks, Older Men in Prison: Survival, Coping, and Identity, in *The Effects of Imprisonment* 343, 346-47 (Alison Liebling & Shadd Maruna eds., 2005). It is highly unlikely that Mr. Morgovsky can receive adequate medical health treatment inside prison. A 69-year-old inmate with his health problems is likely to suffer greater punishment than the average inmate because the Bureau of Prisons often fails to provide adequate or even necessary medical treatment. An audit by the Office of the Inspector General found that the Bureau of Prisons often does not provide “required medical services to inmates.” U.S. Dep’t of Justice, Office of the Inspector General, Audit Division, *The Federal Bureau of Prisons’ Efforts to Manage Health Care* 32, 34 (2008). As one example, an inmate was referred to the chronic care clinic upon intake, but was not seen until five months later, and although an EKG performed at that time showed abnormal results, the results were not reviewed by a doctor until two days later, the day the inmate died of a heart attack. *Id.* at 33. Currently, Mr. Morgovsky’s cardiologist performs EKG’s for him almost weekly.

Preventive services are often not provided in prison, chronic conditions and medication side effects are often not monitored, and unqualified persons are providing services. *Id.* at ii-xx, 32-34, 51-52. *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008) (affirming below-guideline sentence based in part on court’s findings that defendant suffered substantial mental and personal stress as a result of his prosecution, because the court’s findings “were directly relevant to the § 3553(a) analysis, which requires sentences to reflect, among other things, “the history and characteristics of the defendant,” the need to “protect the public from further crimes of the defendant,” the need to “provide just punishment for the offense,” and the need to “afford adequate deterrence”). § 5H1.1 has always provided that “[a]ge may be a reason to depart downward in a case

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1 in which the defendant is elderly and infirm and where a form of punishment such as home  
2 confinement might equally be efficient as and less costly than incarceration.”

3 USSG § 5H1.1.

4 Naum’s age and physical impairment “may be a reason to depart downward only if and to the  
5 extent permitted by” USSG § 5H1.1 and USSG § 5H1.4. See USSG § 5K2.22. That is, they “may be  
6 relevant in determining whether a departure is warranted, if . . . individually or in combination with  
7 other offender characteristics, [they] are present to an unusual degree and distinguish the case from  
8 the typical cases covered by the guidelines.” See USSG § 5H1.1, USSG § 5H1.4. His age “may be a  
9 reason to depart downward” if he is “elderly and infirm and where a form of punishment such as  
10 home confinement might be equally efficient and less costly than incarceration.” USSG § 5H1.1. His  
11 physical impairment would have to be “extraordinary.” USSG § 5K2.22(2). In *Gall*, however, the  
12 Supreme Court upheld a variance to probation based on factors the Commission’s policy statements  
13 prohibited, i.e., voluntary withdrawal from a conspiracy and discontinuing the use of drugs, or  
14 deemed “not ordinarily relevant,” i.e., age, education, and employment. 552 U.S. at 51-60. In  
15 approving the judge’s reliance on these factors, the Supreme Court disregarded the Commission’s  
16 policy statements and imposed no requirement that district courts consider them. In doing so, the  
17 majority rejected Justice Alito’s argument in dissent that the policy statements should be given “some  
18 significant weight.” *Id.* at 61-68 (Alito, J., dissenting).

21 Clearly, Mr. Morgovsky’s advanced age and deteriorated physical condition is an appropriate  
22 consideration in this sentencing proceeding. A substantial variance is warranted.

23  
24 **NEED FOR ADEQUATE DETERRENCE**  
**UNDER 18 U.S.C. § 3553(a)(2)(B)**

25 A severe sentence in Mr. Morgovsky’s case would not serve the sentencing goal of adequate  
26 deterrence under 18 U.S.C. § 3553(a)(2)(B).  
27

1       The empirical evidence fails to establish a relationship between sentence length and general or  
 2 specific deterrence, regardless of the type of crime. *See* Andrew von Hirsch et al., *Criminal*  
 3 *Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) (concluding that  
 4 “correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical  
 5 significance,” and that “the studies reviewed do not provide a basis for inferring that increasing the  
 6 severity of sentences generally is capable of enhancing deterrent effects”); Michael Tonry, *Purposes*  
 7 *and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006) (“[I]ncreases  
 8 in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three  
 9 National Academy of Science panels, all appointed by Republican presidents, reached that  
 10 conclusion, as has every major survey of the evidence.”); David Weisburd et al., *Specific Deterrence*  
 11 *in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995). The  
 12 Sentencing Commission has found that “[t]here is no correlation between recidivism and guidelines’  
 13 offense level. . . . While surprising at first glance, this finding should be expected. The guidelines’  
 14 offense level is not intended or designed to predict recidivism.” U.S. Sent’g Comm’n, *Measuring*  
 15 *Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 15 (2004)  
 16 [“U.S. Sent’g Comm’n, *Measuring Recidivism*”]. *See also* Part IV.A.3, *infra*. And according to “the  
 17 best available evidence, . . . prisons do not reduce recidivism more than noncustodial sanctions.”  
 18 Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91  
 19 *Prison J.* 48S, 50S-51S (2011).

22       Indeed, Mr. Morgovsky’s history and characteristics make him a low risk to re-offend. In fact,  
 23 while it is alleged in the Superseding Indictment that the conspiracy “continuing until at least  
 24 August 25, 2016”, the evidence provided by the Government demonstrates that his last purchase of  
 25 the controlled image intensifier tubes listed in the Superseding Indictment was in July of 2013 and  
 26 the last purchase of the controlled Janos lenses was in March of 2014. The extraordinary burden of  
 27

1 prosecution in this case, including the harm inflicted on Mrs. Morgovsky and the entire family, has  
 2 had a profound effect on Mr. Morgovsky. He accepts responsibility and is genuinely remorseful for  
 3 his conduct, the reasons for which he addressed in his lengthy statement to probation (included in the  
 4 Presentence Report). Mr. Morgovsky, under no circumstances, would put himself and his family  
 5 through this again, nor would he again violate the laws of a country to which he turned in search of  
 6 freedom and justice.

7  
 8 According to the Commission, recidivism rates in general (defined to include technical  
 9 supervised release violations) “decline relatively consistently as age increases,” from 35.5% for  
 10 offenders under age 21, down to 12.7% for offenders age 41 to 50, and down to 9.5% for offenders  
 11 over age 50. U.S. Sent’g Comm’n, Measuring Recidivism at 12 & Exh. 9. The only factors found  
 12 relevant to sentencing decisions that also affected the likelihood of recidivism were age and marriage.  
 13 The finding that age reduced the likelihood of committing subsequent offenses is consistent with the  
 14 body of research that finds that offenders ‘age out’ of crime. The finding that marriage has a  
 15 significant effect on recidivism also is consistent with other research which has found that marriage is  
 16 associated with lower crime rates.” Tina L. Freiburger & Brian M. Iannacchione, An Examination of  
 17 the Effect of Imprisonment on Recidivism, 24 Crim. Just. Stud. 369, 377 (2011). The cost of  
 18 incarcerating prisoners age 50 and older has been estimated to be two to four times that of the general  
 19 inmate population. “In addition to the economic costs of keeping older prisoners incarcerated, it is  
 20 important to consider whether the infringement upon the liberty interest of an older prisoner who is  
 21 no longer dangerous is justified.” The Commission’s research also demonstrates that employment,  
 22 education, and family ties and responsibilities all predict reduced recidivism, see U.S. Sent’g  
 23 Comm’n, Measuring Recidivism at 12-13 & Ex. 10; U.S. Sent’g Comm’n, Recidivism and the “First  
 24 Offender” 8 (2004), as does substantial other research. Fn12: See Miles D. Harer, Federal Bureau of  
 25 Prisons, Office of Research and Evaluation, Recidivism Among Federal Prisoners Released in 1987,  
 26  
 27

1 at 5-6, 54 (1994),

2 [http://www.bop.gov/news/research\\_projects/published\\_reports/recidivism/oreprrecid87.pdf](http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf).

3 Naum Morgovsky presents a long history of employment and strong family ties, while  
 4 furthering his education and not abusing drugs. Further, “[r]ecidivism rates decline relatively  
 5 consistently as age increases,” from 35.5% of offenders under age 21, to 12.7% over age 40. *See*,  
 6 U.S.S.C., “Criminal History Computation” at 12 and 28 (showing recidivism rates of just 6.9% for  
 7 offenders aged between 40 and 50 in Criminal History Category I. Mr. Morgovsky turned 69 in  
 8 September. We recognize that respect for the law, just punishment, and deterrence demand  
 9 supervision. But, too harsh a sentence fails to respect the law just as much as too lenient a  
 10 sentence,<sup>6</sup> and it violates the statute requiring this sentence to be no greater than necessary.  
 11 This defendant’s age, long marriage, strong family support, in addition to evidence that he is no  
 12 longer involved in the charged conspiracy for a considerable period prior to indictment and his  
 13 sincere remorse and acceptance of responsibility strongly support the conclusion that he will not  
 14 reoffend.  
 15

### 16 AN APPROPRIATE SENTENCE

17  
 18 In admitting his guilt and expressing his remorse, Mr. Morgovsky acknowledges that he  
 19 deserves a punishment of incarceration. He is only seeking that the incarceration be not as extensive  
 20 as is recommended in the PSR. Where a defendant is advanced in years, has accepted responsibility  
 21 for his offense, and does not pose a danger to others in the community “the interests of the society as  
 22 a whole, as well as individual victims of crime can continue to be served through the imposition of  
 23 alternative sentences such as restitution and community service.” *See* Pub. L. No. 98-473, § 239, 98  
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25 <sup>6</sup> See Justice Anthony Kennedy, Testimony before the Senate Judiciary Committee,  
 26 February 14, 2007 (“Our sentences are too long, our sentences are too severe, our  
 27 sentences are too harsh. . . there’s no compassion in the system. There’s no mercy in  
 the system.”)

1 Sat.1987, 2039 (1984). Prison overcrowding remains a serious problem in the federal system and  
 2 incarceration of older and infirm inmates exacerbates this problem, casting the burden of elder  
 3 medical and psychological care on the system, and ultimately on the taxpayers. The court's task in  
 4 Mr. Morgovsky's case, as in all cases, is to fashion a sentence sufficient but not greater than  
 5 necessary to achieve the sentencing goals in Section 3553(a). Under all the circumstances, we  
 6 respectfully submit that a sentence of 18 months incarceration and a comparable period of home  
 7 confinement will provide a just punishment for Mr. Morgovsky. Home confinement and supervised  
 8 release, while infinitely preferable to lengthy incarceration, can be a severe punishment, hugely  
 9 restrictive of liberty, effective in deterring misconduct and amply retributive. In fact, during his  
 10 pretrial release, Mr. Morgovsky has already sustained home confinement for over 17 months without  
 11 being permitted to do even grocery shopping. He has been completely compliant with these  
 12 conditions, but has felt the sting of this loss of liberty and freedom of movement. The Supreme Court,  
 13 in the *Gall* case, agreed with United States District Judge Pratt that probation is a "substantial  
 14 restriction of freedom," 552 U.S. at 48, stating: "We recognize that custodial sentences are  
 15 qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are  
 16 nonetheless subject to several standard conditions that substantially restrict their liberty." *See United*  
 17 *States v. Knights*, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that  
 18 probationers 'do not enjoy the absolute liberty to which every citizen is entitled'" (quoting *Griffin v.*  
 19 *Wisconsin*, 483 U.S. 868, 874 (1987))).

22 A split sentence of a combination of 18 months incarceration and 18 months home  
 23 confinement is appropriate in this case. It punishes Mr. Morgovsky for his actions and serves the  
 24 interests of deterrence and protection of the public. There is very little likelihood of Mr. Morgovsky  
 25 reoffending. He has minimal criminal history and strong family support. Nor has he been involved in  
 26 unlawful conduct in recent years. Evidence provided by the government demonstrates that his last  
 27

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1 purchase of the controlled image intensifier tubes listed in the superseding indictment was in July of  
2 2013 and his last purchase of controlled Janos lenses was in March of 2014. Since charges were  
3 brought in this case, Mr. Morgovsky has resolved not to re-offend, but to devote his efforts to his  
4 family and to the good work he has been doing and will continue to do in the community.

### 5 CONCLUSION

6 We respectfully request that this court sentence Mr. Morgovsky to 18 months incarceration  
7 and 18 months home confinement, followed by a term of supervised release. We also request that, as  
8 recommended by the probation officer, he be allowed to self-report to any institution designated by  
9 the Bureau of Prisons. This requested sentence is “sufficient, but not greater than necessary” to  
10 achieve the purposes of sentencing set forth in 18 U.S.C. Section 3553(a)(2).  
11  
12

13 Date: October 16, 2018

Respectfully submitted,

14  
15 /s/ William L. Osterhoudt

16 William L. Osterhoudt, Esq.,  
17 Attorney for Defendant Naum Morgovsky  
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